Supreme Court, U.S.
FILED

02 424 SEP 12 2002

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No. 02-___

In The
Supreme Court Of The United States

Patricia Snowden,

Petitioner,

and

Karen Dowhite, Sheila Diane Dowhite, Lilistyne Dowhite, Renee Wingo Roberts, and Michael Smith, Sr.

Plaintiffs,

v.

CheckPoint Check Cashing and Elite Financial Services, Incorporated

Respondents,

and

Unknown Other Persons and Entities,

Defendants

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower court erred by holding, in direct conflict with three state courts of last resort, that under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, and this Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), an arbitrator—not a court—has authority to decide whether a contract containing an arbitration clause is void *ab initio* in its entirety because one party had no legal authority to enter into it and because its terms are illegal under applicable state law.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner Patricia Snowden, plaintiffs Karen Dowhite, Sheila Diane Dowhite, Lilistyne Dowhite, Cynthia Powell, Renee Wingo Roberts, and Michael Smith, Sr., respondents CheckPoint Check Cashing and Elite Financial Services, Incorporated, and defendants Unknown Other Persons and Entities.

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The opinion of the U.S. Court of Appeals for the 4th Circuit (App. 1-13) is reported at 290 F.3d 631 (2002). The unreported opinion of the U.S. District Court for the District of Maryland (App. 15-18) was entered on September 7, 2001.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2002. Pursuant to Rule 13.5 of the Rules of this Court, Rehnquist, C.J. as Circuit Justice, granted Petitioners an extension of time for filing this petition to and including September 12, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The substantive provision of the Federal Arbitration Act of 1925 ("FAA") at issue, 9 U.S.C. § 2, reads as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.

The procedural provision of the FAA at issue, 9 U.S.C. § 4, reads in relevant part as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. . . .*If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.* . . .

(emphasis added)

The state law provisions at issue in the case read as follows:

MD. CODE ANN., FIN. INST. § 11-204. Requirement of license

> (a) Unless a person is licensed by the Commissioner, the person may not:
>
> (1) Make a loan; or
>
> (2) In any way use any advantage provided by the Maryland Consumer Law.

MD. CODE ANN., FIN. INST. § 11-222. Violation of provisions

Any person who violates any provision of § 11-204(a) of this subtitle is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $5,000 or imprisonment not exceeding 3 years or both.

MD. CONST. ART. III, § 57. Legal Rate of Interest

The Legal Rate of Interest shall be Six per cent per annum; unless otherwise provided by the General Assembly.

MD. CODE ANN., COM. LAW § 12-306. Interest

(a)(2) For any loan with an original principal balance of $2,000 or less, the maximum interest rate is:

(i) 2.75% interest per month on that part of the unpaid balance not more than $500;

MD. CODE ANN., COM. LAW § 12-314. Loans for six thousand dollars or less

(b)(1) A loan made in the amount of $6,000 or less, whether or not the loan is or purports to be made under this subtitle, is unenforceable if a rate of interest, charge, discount, or other consideration greater than that authorized by the law of this State is contracted for by any person unless the excess rate contracted for is the result of a clerical error or mistake and the person corrects the error or mistake before any payment is received under the loan.

MD. CODE ANN., COM. LAW § 12-316. Knowing violations

> Any licensee or his officer or employee who knowingly violates any provision of §§ 12-303 through 12-306, § 12-308, § 12-311, § 12-313, or § 12-314 of this subtitle is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $500 or imprisonment not exceeding 6 months or both.

STATEMENT OF THE CASE

This case presents the question of whether, under the FAA, a court or an arbitrator has the authority to decide whether a contract containing an arbitration clause is void *ab initio* in its entirety because one party lacked signatory authority to enter into the contract and because the contract's terms violate applicable state civil and criminal law. A deep split of federal and state appellate authority has emerged on this issue as four federal circuit courts, including the court below, have held that challenges to the existence of a contract must be resolved through arbitration, while three State supreme courts have held that under the FAA only courts may decide these issues because they implicate the very existence of any agreement to arbitrate between the parties.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Court held that a claim of fraud in the inducement of a contract containing an arbitration clause was subject to arbitration because the arbitration provision was severable from the rest of the agreement. *Prima Paint* addressed a contract defense claim that would have rendered the contract voidable, though not automatically void.

The Fourth Circuit below extended *Prima Paint* by holding that an arbitrator must resolve challenges to the formation and existence of a legal contract. Petitioner argued below that

Respondents' entire payday loan contracts, including their arbitration provisions, were void *ab initio* because Respondents were unlicensed to make the loans involved in this case and because the interest rates charged by Respondents rendered the loans illegal and void under applicable state law.

The Fourth Circuit's holding that these claims are subject to arbitration deepens an existing split of authority and directly conflicts with several state supreme court decisions holding that, under the FAA, a court must determine the existence of a contract between the parties before it can order arbitration. This decision also conflicts with the rationale behind the rulings of other federal circuits that courts must resolve allegations that an entire contract is void. Finally, by singling out the arbitration clause to be enforced when the existence and legality of the entire contract is in dispute, the decision below conflicts with this Court's repeated holdings that the FAA does no more than place arbitration agreements on the same footing as other contracts.

A. Factual Background

Petitioner Patricia Snowden entered into her first loan with Respondents at one of Checkpoint Check Cashing's Baltimore locations on June 12, 1999. To obtain $150 cash, Snowden had to submit a check for $180 that would be payable within 14 days, on the date of her next paycheck. These transactions are commonly referred to as "payday loans." Checkpoint deposited the check, and the check cleared. On June 29, 1999, Snowden began to repeat this process, obtaining $200 cash by submitting a check for $240 that was also payable within 14 days on the date of her next paycheck. Checkpoint deposited the check, and the check cleared. Between June 1999 and February 2000, Snowden and Checkpoint engaged in approximately 12 payday

loan or "roll-over" transactions.[1] App. 16. For a borrowed principal that never exceeded $250 at one time and a borrowing period that totaled 168 days, Patricia Snowden paid Checkpoint more than $600 in additional interest costs. As an annual percentage rate, these charges that Snowden paid to Checkpoint totaled more than 500%.[2]

In November 1999, in the midst of these transactions, Checkpoint inserted into its loan documents with Petitioner Snowden a provision requiring arbitration of disputes related to the parties' past and future transactions. App. 16. The provision stated in relevant part as follows:

> 5. Arbitration Provision. Any claim, dispute, or controversy (whether in contract, tort, or otherwise, whether pre-existing, present or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement or any check or instrument cashed by CheckPoint or fee charged by CheckPoint either prior or

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[1] In roll-over transactions, the borrower extends the existing debt for additional periods of time, and thereby incurs additional charges, due to an inability to make full payment on the original check.

[2] The other plaintiffs who filed suit in this case entered into similar transactions with Checkpoint. Plaintiff Karen Dowhite engaged in approximately 10 payday loan or rollover transactions with Checkpoint at one of its Baltimore locations between April 1999 and February 2000, incurring interest costs of more than 300% APR on a principal that did not exceed $300. Plaintiff Renee Roberts engaged in approximately 15 payday loan or rollover transactions with Checkpoint at one of its Baltimore locations between February 1999 and February 2000, incurring interest costs of more than 300% APR on a principal that did not exceed $400.

> subsequent to this Agreement or the relationships that result from this Agreement (including, to the full extent permitted by applicable law, relationships with third-parties who are not signatories to this Agreement or this Arbitration Provision) or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement (collectively "Claim"), shall be resolved, upon the election of you or CheckPoint or said third-parties, by binding arbitration pursuant to this Arbitration Provision and the Commercial Arbitration Rules in effect at the time the Claim is filed. A party who has asserted a claim in a lawsuit in court may elect arbitration with respect to any claim(s) subsequently asserted in that lawsuit by any other party or parties. **THERE SHALL BE NO AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION BASIS. FURTHER, AN ARBITRATION** [*sic*] **CAN ONLY DECIDE CHECKPOINTS** [*sic*] **OR YOUR CLAIM AND MAY NOT CONSOLIDATE OR JOIN THE CLAIMS OF OTHER PERSONS WHO HAVE SIMILAR CLAIMS.**

Quoted at App. 3-4 (emphasis in original).

The question before the Court is whether this provision is enforceable in light of Petitioner's allegations that Respondents lacked authority under applicable state law to enter into the agreements at issue and that the illegal terms of the agreements render them void and unenforceable in their entirety.

B. The Proceedings Below.

Patricia Snowden, as representative of a putative class of borrowers, filed suit against Respondents on June 26, 2000, in the federal district court for the District of Maryland. The complaint asserted that Checkpoint's payday loan contracts violated the federal Truth in Lending Act (15 U.S.C. §§ 1601 *et seq.*), the Racketeer Influenced and Corrupt Practices Act (18 U.S.C. §§ 1961 *et seq.*), and Maryland's Consumer Loan Act (MD. COM. LAW §§ 301 *et seq.*), Interest and Usury Statute (MD. COM. LAW §§ 101 *et seq.*), and the State's common law of fraud. App. 4-5.

The plaintiff class alleged that Checkpoint was charging and collecting usurious interest for short-term consumer loans under the guise of cashing checks. The complaint alleged that the charges on these payday loans resulted in annual percentage rates of 300 to 400 percent, more than ten to twelve times Maryland's 2.75 percent interest per month (33 percent per annum) usury threshold on small consumer loans.[3] The complaint further alleged that Checkpoint enforced these illegal payments in part by threatening borrowers with criminal prosecution under Maryland's bad check law. Finally, the plaintiffs alleged that Checkpoint was not licensed under the Maryland Consumer Act, and therefore was issuing consumer loans in violation of state law. App. 8.

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[3] These charges are also more than 50 to 60 times the six percent legal rate of interest under Maryland's Constitution if the state's consumer loan laws were found not to apply to the parties' transactions. *See* MD. CONST. ART. III, § 57.

On March 29, 2001, Checkpoint moved the district court to compel arbitration of all of Snowden's claims.[4] Snowden argued in response that the court should rule that Checkpoint's mandatory arbitration clause was unenforceable because the entire payday loan agreement in which it appeared was void *ab initio* as a matter of law. This argument was based on the separate facts that Checkpoint was not licensed in Maryland to make consumer loans, which rendered its contracts illegal and void,[5] and that the loans themselves imposed usurious interest charges, a practice punishable as a crime under Maryland's Consumer Loan Law.[6] *Id.* Snowden further argued that Checkpoint's arbitration clause was itself unconscionable as a contract of adhesion that deprived prevailing plaintiffs of their right to recover attorneys' fees and of the right to proceed on a class-wide basis in any case. *Id.* at 12.

On September 7, 2001, the district court denied Checkpoint's motion to compel arbitration without prejudice. The court noted that Snowden was a named plaintiff in a case where a motion for class certification would be forthcoming, and ruled that it would be inappropriate to order her claims into arbitration before the court determined whether she had any role to play in the pending class action. *Id.* at 17.

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[4] The motion for arbitration applied only to Snowden's claims, and not to those of the other named plaintiffs. *See* App. 15-16 n.1. Snowden is thus the only plaintiff pursuing the appeal that is the subject of this petition.

[5] *See* MD. CODE ANN., FIN. INST. § 11-204(a)(1) (entitled "Requirement of license").

[6] *See* MD. CODE ANN., COM. LAW § 12-314(b)(1) (loan in excess of applicable statutory interest rate is unenforceable); MD. CODE ANN., COM. LAW § 12-316 (imposing criminal sanctions for knowing violation of applicable statutory interest rate).

On May 15, 2002, the Fourth Circuit vacated the district court's order and remanded the case with instructions to grant Checkpoint's motion to compel arbitration against Snowden. The court of appeals held first that the district court's order denying the motion to compel arbitration without prejudice was an appealable order under 9 U.S.C. § 16(a)(1). The court then turned to Snowden's arguments against enforcement of the arbitration clause. App. 6-7.

On this point, the Fourth Circuit held that Snowden's arguments that Checkpoint's unlicensed loan contract was illegal and void must be resolved through arbitration under this Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). App. 8-9. The court recognized that *Prima Paint* involved claims of fraud in the inducement of a contract, *Id.* at 9, which, unlike Snowden's claims, did not render the entire contract void and therefore did not implicate the making of the arbitration agreement. The court also noted several federal circuit court decisions holding that *Prima Paint's* severability doctrine does not extend to allegations that an entire contract is void. *Id.* at 9-10. Still, the court held that Snowden's allegations must be arbitrated because they did not challenge a party's assent to the underlying contract. *Id.* at 10. Finally, the Fourth Circuit rejected Snowden's argument that the arbitration clause itself was unconscionable, finding that the clause did not attempt to override applicable statutory provisions creating a right for prevailing plaintiffs to recover attorneys' fees and that the arbitration clause's prohibition of class action proceedings was valid because Snowden and other payday loan borrowers from Checkpoint would still be able to obtain legal representation based on the availability of statutory fee awards. *Id.* at 12-13.

REASONS FOR GRANTING THE WRIT

I. There is a Deep Split of Authority on Whether the FAA Authorizes a Court or an Arbitrator to Decide if an Entire Contract is Illegal and Void.

Review is warranted because there is a direct split of authority between the Fourth Circuit's holding below (along with decisions of at least three other federal circuit courts) and the holdings of three State supreme courts as to whether a court or an arbitrator has authority under the FAA to determine whether an underlying contract is void based on a party's lack of signatory authority or based on the contract's illegal terms under applicable state law.

In *Pittsfield Weaving Co., Inc. v. Grove Textiles, Inc.*, 430 A.2d 638 (N.H. 1981), the New Hampshire Supreme Court unanimously refused to enforce an arbitration provision in a contract for the sale of yarn based on its finding that the entire contract was unconscionable. After noting that state contract law rendered any contract deemed unconscionable to be void, the court rejected the defendant's argument that *Prima Paint* required arbitration of the plaintiff's allegations and held that, if the trial court found the entire contract, "*including the arbitration clause*," to be unconscionable, then it could under the FAA properly deny the defendant's motion for arbitration. *Id.* at 639-40 (emphasis in original).

In *Alabama Catalog Sales v. Harris*, 794 So.2d 312 (Ala. 2000), the Alabama Supreme Court held that under the FAA a court, rather than an arbitrator, must determine whether a payday loan contract with an arbitration clause was illegal and void because its usurious interest rate violated the state's Small Loan Act. The court rejected the defendant's argument that

Prima Paint required submission of the plaintiffs' allegations to arbitration, finding instead that *Prima Paint* applies narrowly to arguments that a contract is voidable or subject to revocation, and that the plaintiffs' argument that the payday loan contract was void went to the very existence of an agreement. *Id.* at 315-317; *see also Camaro Trading Co., Ltd. v. Nissei Sanryo America, Ltd.*, 577 So.2d 1274 (Ala. 1991) (holding that court, rather than arbitrator, must determine whether contract containing arbitration clause is illegal and void).[7]

In *Nature's 10 Jewelers v. Gunderson*, 648 N.W.2d 804 (S.D. 2002), decided after issuance of the decision below, the South Dakota Supreme Court held that an arbitration clause in a franchise agreement was unenforceable because the entire agreement was void where the franchisor's registration with the State to operate franchise stores had expired several months before the parties entered into their agreement. Because the franchisor's license to conduct this type of business had previously expired, the South Dakota Supreme Court held that the entire franchise agreement violated the applicable state statute and was void from its inception (not merely voidable at the parties' election). Therefore, the agreement's arbitration provision could not be enforced. The court concluded that it "will not permit the individuals who committed the illegal acts

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[7] At least two intermediate state appellate court decisions have similarly held that a court must resolve allegations that a contract is illegal and void before enforcing the contract's arbitration clause. *See FastFunding the Co., Inc. v. Betts*, 758 So.2d 1143 (Fla. Dist. Ct. App. 2000) (court determines whether consumer loan contract containing arbitration clause is illegal and void in its entirety); *Party Yards, Inc. v. Tempelton*, 751 So.2d 121 (Fla. Dist. Ct. App. 2000) (same).

on behalf of the corporation to benefit from the arbitration clause in the illegal contract." *Id.* at 807.[8]

The decision below and other recent circuit court decisions are directly contrary to these State supreme court holdings. The Fourth Circuit held that, because Snowden's "allegations of usurious interest rates and non-licensure" are not addressed to the arbitration clause itself and do not allege a failure of assent to the entire conract, they could not serve as a basis for the denial of Checkpoint's motion to compel arbitration. App. ##; *see also Burden v. Check into Cash of Kentucky, LLC*, 267 F.3d 483, 490 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1436 (Apr. 1, 2002) (No. 01-1078) (allegations that payday loan contract is illegal and void *ab initio* under state law due to lender's lack of requisite license and loans' usurious terms must be arbitrated); *Bess v. Check Express*, 294 F.3d 1298, 1305-06 (11th Cir. 2002) (same); *cf. Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159 (5th Cir. 1987) (claim that franchise agreement is illegal under state statute is subject to arbitration). These were precisely the types of allegations that served as the basis for the Alabama, South Dakota, and New Hampshire Supreme Courts to deny arbitration motions in cases decided under the FAA. Review is warranted here to resolve this deep split of authority among the federal and state courts of appeal on these recurring questions of federal law.[9]

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[8] Two members of the South Dakota Supreme Court dissented in *Gunderson*. After noting that it was "undisputed" that the FAA provided controlling law in the case, the dissenters proceeded to argue that the claims against the validity of the underlying franchise agreement should be referable to arbitration under *Prima Paint*. *Id.* at 809-10 (Konenkamp, J. dissenting).

[9] This question of federal law under the FAA is certain to arise on a recurring basis in federal and state courts alike because, although the FAA

This split of authority is also reflected in a larger body of cases where federal and state courts of appeal have struggled to define the outer limits of *Prima Paint*'s severability doctrine. Most circuit courts have refused to extend *Prima Paint*'s holding regarding allegations of fraud in the inducement of a contract to the very different type of allegation that the entire contract is void *ab initio* and therefore never came into existence in the first place.[10] These courts have held that this latter type of allegation by definition implicates the "making of the agreement for arbitration," 9 U.S.C. § 4, and therefore must be decided by a court as a precondition to any arbitration order under the FAA.[11] For example, in *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000) (Becker, J.), the Third Circuit held that a party cannot enforce an arbitration clause while denying that it is bound by the contract containing that clause because, "[e]ven under the severability doctrine [of *Prima Paint*], there may be no arbitration if the agreement to arbitrate is non-existent." *Id.* at 101. The Third Circuit construed *Prima Paint* as applying only to allegations that would render a contract *voidable*, and held that courts must

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creates federal substantive law regarding the enforcement of arbitration agreements, the Act does not create any independent federal-question jurisdiction. *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984).

[10] *See, e.g.*, Black's Law Dictionary at 3 (6th ed. 1991) (defining void *ab initio* to mean that agreement "has at no time had any legal validity").

[11] Although this case is governed by Section 3 of the FAA, 9 U.S.C. § 3, rather than Section 4 because the underlying claims were first asserted in court, *Prima Paint* holds that Section 4's requirement for judicial resolution of all issues related to the making of an arbitration agreement also applies in Section 3 proceedings. *Prima Paint*, 388 U.S. at 404.

resolve all allegations that would render an entire contract (and therefore its arbitration clause) *void*:

> Mindful of the doctrine announced in *Prima Paint*, which did not consider a situation in which the *existence* of the underlying contract was at issue, we draw a distinction between contracts that are asserted to be "void" or non-existent, as is contended here, and those that are merely "voidable," as was the contract at issue in *Prima Paint*, for purposes of evaluating whether the making of the arbitration agreement is in dispute.

Id. at 107.[12] The decision below directly conflicts with this rationale underpinning *Sandvik's* holding by requiring arbitration of Snowden's claims that Checkpoint's contract is void, and therefore never came into existence, based on Checkpoint's lack of signatory authority and on its illegal terms.

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[12] *See also Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (7th Cir. 2001) (court decides whether agent had authority to bind party to contract); *Chastain v. Robinson Humphrey, Inc.*, 957 F.2d 851 (11th Cir. 1992) (court decides allegation that signature to contract was forged); *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140 (9th Cir. 1991) (court decides whether signatory to contract had authority to bind party, limiting *Prima Paint* to "challenges seeking to *avoid* or *rescind* a contract") (emphasis in original); *I.S. Joseph Co., Inc. v. Michigan Sugar Co.*, 803 F.2d 396 (8th Cir. 1986) (court decides whether assignee can enforce contract); *cf. McNally Pittsburgh, Inc. v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 812 F.2d 615, 620 (10th Cir. 1987) (in labor relations case, court resolves company's allegation that agent inadvertently signed contract and notes that "[e]ven under the *Prima Paint* construction of the Arbitration Act, a claim that no contractual relation existed between the parties must be resolved before the court can order arbitration).

Federal and state courts of appeal have struggled and come into conflict over where to draw the line between disputes regarding contracts that courts must resolve and those disputes that are referable to arbitration. The court below and several other federal circuits have held that courts may only address disputes over assent to the contract as a whole, and that any other challenge to the existence or legality of the contract must be arbitrated under *Prima Paint*.[13] But other courts hold that courts must decide *any* allegation that would render contract void *ab initio*, including the argument made below that the entire contract is illegal under applicable state law, because a void contract by definition never came into existence and therefore never had an enforceable arbitration clause.[14] By viewing the "making of the agreement for arbitration" under the FAA *solely* as a question of party assent, the former group of cases abrogates a substantial body of state laws, like Maryland's consumer loan statutes, that regulate contract formation in order to advance specific public policy goals. By contrast, the latter group of cases apply to arbitration agreements the same rules of state law that apply to the making of any other contract and

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[13] *See* App. 10; *Burden v. Check into Cash*, 267 F.3d at 490; *Bess v. Check Express*, 294 F.3d at 1305-06; *see also Sphere Drake*, 256 F.3d at 591 (courts must decide claims of lack of agency, forgery, and missing consideration).

[14] *See, e.g., Alabama Catalog Sales v. Harris*, 794 So.2d at 316-17 ("the trial court, as opposed to the arbitrator, must decide the ultimate question relating to the legality and enforceability of the contracts"); *Nature's 10 v. Gunderson*, 648 N.W.2d at 807 ("'A claim that a contract is illegal and, as in this case, criminal in nature is not a matter which can be determined by an arbitrator.'") (quoting *Party Yards, Inc. v. Templeton*, 751 So.2d at 123); *see also Sandvik AB*, 220 F.3d at 107 (in case involving agent's signature authority, holding broadly that *Prima Paint* does not apply to any allegation that a contract is void).

thereby are consistent with the underlying purpose of the FAA to place arbitration agreements on the same footing as other contracts.

The Court therefore should grant review to resolve this split of authority over the scope of *Prima Paint*, to prevent further confusion among the federal and state courts of appeal, and to ensure that arbitration agreements are subject to the same rules of state law that apply to the many different types of contracts in which they are more and more frequently appearing.

II. By Enforcing the Arbitration Clause When the Whole Contract is Alleged to be Illegal and Void, the Decision Below Conflicts with this Court's Holdings that the FAA Places Arbitration Clauses on the Same Footing as Other Contracts.

The decision below is also in conflict with this Court's repeated holdings that federal policy regarding arbitration is simply one of enforcing contracts and that the FAA does no more or less than place arbitration agreements on the same footing as other agreements. Earlier this year, the Court refused to enforce an arbitration provision in an employment contract in a case where claims were asserted by a federal agency that was not a party to that contract. *See Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 122 S. Ct. 754 (2002). In holding that the FAA's policies regarding arbitration do not overcome the requirement of an agreement between the parties to a dispute, the Court explained that the purpose of the Act was simply to "'reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, *and to place arbitration agreements on the same footing as other contracts.*'" *Id.* at 761 (quoting *Gilmer v. Interstate/Johnson*

Lane Corp., 500 U.S. 20, 24 (1991)) (emphasis added). In so holding, this Court reaffirmed that courts must apply the same rules of contract law to arbitration agreements as apply to all other contractual provisions.

Similarly, in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), this Court held that the FAA preempted a state statute that imposed specific disclosure requirements applicable only to arbitration agreements. The Court echoed its earlier decisions in explaining that, through the FAA, "Congress precluded states from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." *Id.* at 687 (internal quotation omitted). In an earlier decision involving FAA preemption, the Court elaborated on the fact that the FAA does no more than place arbitration clauses on the same footing as other contracts and contractual provisions:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. § 2 (emphasis added). What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.

Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 281 (1995).

Snowden's allegations challenging the legality of Checkpoint's payday loan contracts in their entirety present the inverse of what the Court hypothesized in *Allied-Bruce Terminix*. Snowden alleges that Checkpoint had no authority to make these contracts under Maryland law because it was not licensed to make consumer loans. App. 8. Snowden further alleges that Checkpoint's excessive interest rates render the entire loan contracts void *ab initio* under Maryland's consumer loan and usury laws. *Id.* The Fourth Circuit held that the arbitration provision of this allegedly illegal and void contract must be singled out and given effect before there is a determination as to whether all of the contract (including the arbitration clause) was legally formed. *Id.* at 8-10. This is not an application of ordinary contract law and this does not place the arbitration clause on the same footing as the other provisions of Checkpoint's payday loan contract. Instead, this ruling misapplies the FAA to require arbitration where the basic question of whether there was ever a legal contract between the parties, and therefore whether there was ever an arbitration agreement, is still in dispute.

In short, by extending *Prima Paint* to require enforcement of an arbitration clause when the entire contract in which it appears is alleged to be illegal and void, the decision below conflicts with this Court's repeated interpretations of the FAA. In light of this conflict and because the decision below deepens an already substantial split of authority among federal and state appellate courts on the question of whether the FAA requires enforcement of an arbitration provision in an allegedly illegal and void contract, the Court should grant review and resolve these conflicts on this important question of federal law.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATRICIA SNOWDEN,
Plaintiff-Appellee,
and
KAREN DOWHITE; SHEILA DIANE
DOWHITE; LILISTYNE DOWHITE;
CYNTHIA POWELL; RENEE WINGO
ROBERTS; MICHAEL SMITH, SR.,
Plaintiffs,

No. 01-2149

v.

CHECKPOINT CHECK CASHING; ELITE
FINANCIAL SERVICES, INCORPORATED,
Defendants-Appellants,
and
UNKNOWN OTHER PERSONS AND
ENTITIES,
Defendants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Andre M. Davis, District Judge.
(CA-00-1945-AMD)
Argued: February 26, 2002
Decided: May 15, 2002
Before NIEMEYER, Circuit Judge,
HAMILTON, Senior Circuit Judge, and
Raymond A. JACKSON, United States District Judge for the
Eastern District of Virginia, sitting by designation.

Vacated and remanded by published opinion. Senior Judge Hamilton wrote the opinion, in which Judge Niemeyer and Judge Jackson joined.

COUNSEL

ARGUED: William Willis Carrier, III, TYDINGS & ROSENBERG, L.L.P., Baltimore, Maryland, for Appellants. John Thomas Ward, WARD, KERSHAW & MINTON, P.A., Baltimore, Maryland, for Appellee. **ON BRIEF:** Ann M. Grillo, TYDINGS & ROSENBERG, L.L.P., Baltimore, Maryland, for Appellants. Richard A. Fisher, LOGAN, THOMPSON, MILLER, BILBO, THOMPSON & FISHER, P.C., Cleveland, Tennessee, for Appellee.

OPINION

HAMILTON, Senior Circuit Judge:

In this interlocutory appeal, Elite Financial Services, Inc. (Elite) challenges the district court's denial of its motion to compel arbitration of, and stay proceedings with respect to, various federal and Maryland state law claims lodged against it by Patricia Snowden (Snowden), one of Elite's deferred deposit transaction customers. For reasons that follow, we vacate the district court's order denying Elite's motion to compel arbitration and stay proceedings and remand with instructions.

I.

During the period between June 12, 1999 and February 7, 2000, Snowden, a Maryland citizen, engaged in twelve so-called "deferred deposit" transactions at stores owned and operated by Elite.[1] In a deferred deposit transaction, a customer tenders a

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[1]Elite operated the stores under the trade name "CheckPoint Check Cashing" (CheckPoint).

check to the store that is cashed for a service fee with the understanding that the check will not be negotiated until some later, agreed upon time.

Of the twelve deferred deposit transactions in which Snowden engaged, only the November 4, 1999 agreement memorializing the sixth deferred deposit transaction contained an arbitration provision. From this point forward, we will refer to this agreement in its entirety as "the November 4, 1999 Agreement." Of relevance in the present appeal, the November 4, 1999 Agreement provided that Snowden and Elite (t/a CheckPoint) mutually agreed that either party had the right to elect to resolve by binding arbitration:

> [a]ny claim, dispute, or controversy (whether in contract, tort, or otherwise, whether pre-existing, present or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement or any check or instrument cashed by CheckPoint or fee charged by CheckPoint either prior or subsequent to the date of this Agreement . . . .

(J.A. 54). Pursuant to the November 4, 1999 Agreement, the parties also mutually agreed that: (1) "[i]f arbitration is chosen, it will be conducted with the American Arbitration Association (the "AAA") pursuant to the AAA's Commercial Arbitration Rules"; (2) "THERE SHALL BE NO AUTHORITY FOR ANY CLAIMS TO BE ARBITRATED ON A CLASS ACTION BASIS"; (3) "AN ARBITRATION CAN ONLY DECIDE CHECKPOINT[']S OR YOUR CLAIM AND MAY NOT CONSOLIDATE OR JOIN THE CLAIMS OF OTHER PERSONS WHO MAY HAVE SIMILAR CLAIMS"; (4) any "participatory arbitration hearing . . . will take place in the federal judicial district" of Snowden's residence; (5) Elite "will advance the first $50 of the filing and hearing fees for any claim in connection with the

arbitration"; and (6) "[t]his arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16." *Id.* From this point forward, we will refer to all of the language in the November 4, 1999 Agreement pertaining to the subject of arbitration as the "Arbitration Agreement."

The substantive provisions of the FAA that are relevant in the present appeal are sections 2, 3, and 4. 9 U.S.C. §§ 2-4. Section 2 of the FAA provides that a written provision for arbitration "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 3 of the FAA requires the federal district court in which the action is brought, "upon any issue referable to arbitration under an agreement in writing for such arbitration," to "stay the trial of the action" pending arbitration once it is satisfied that the issue is arbitrable under the agreement. *Id.* § 3. Finally, section 4 directs the federal district court to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored.

On June 26, 2000, Snowden, Karen Dowhite, Sheila Dowhite, Lilistyne Dowhite, Cynthia Powell, Renee Roberts, and Michael Smith, Sr. (collectively the Plaintiffs) filed a purported class action suit in the United States District Court for the District of Maryland against Elite.[2] The essential allegations of the complaint

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[2]The Plaintiffs also named CheckPoint as a defendant. As previously explained, CheckPoint is merely a trade name for Elite. As such, CheckPoint is not a separate legal entity capable of being sued. *See Bauer v. Pounds*, 762 A.2d 499, 503 (Conn. App. Ct. 2000) ("It appears well settled that the use of a fictitious or assumed business name does not create a separate legal entity and that the designation d/b/a is merely descriptive of the person or corporation who does business under some

are: (1) that the Plaintiffs' deferred deposit transactions with Elite were loans; and (2) that the service fee charged by Elite for such transactions constituted interest. Based on these allegations, the Plaintiffs asserted various state and federal claims, including but not limited to claims alleging violation of the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-93, violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c), violation of the Maryland Consumer Protection Act, Md. Code Ann., Commercial Law II § 13-408 (2000), and fraud under Maryland common law.

Elite subsequently moved to compel arbitration of all of Snowden's claims and to stay proceedings in the district court with respect to those claims, or in the alternative, to dismiss all of Snowden's claims (Elite's Motion to Compel Arbitration/Stay Proceedings).[3] The district court denied the motion without prejudice. In so doing, the district court operated under the belief that the issue of the enforceability of the Arbitration Agreement

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other name.") (internal quotation marks, ellipses, and alterations omitted); *American Express Travel Related Servs. Co. v. Berlye*, 414 S.E.2d 499, 501 (Ga. Ct. App. 1991) ("The use of d/b/a or 'doing business as' to associate a tradename with the corporation using it does not create a legal entity separate from the corporation but is merely descriptive of the corporation."); 8 *Fletcher Cyclopedia of the Law of Private Corporations* § 3831 (revised ed. 1992 & Supp. 1999) ("[U]sing d/b/a or 'doing business as' to associate an assumed or fictitious name with a corporation does not, without more, create a separate legal entity different from the corporation."). For purposes of this opinion, we treat Elite as the sole defendant.

[3]According to the district court, of all of the Plaintiffs, only Snowden had executed an agreement with Elite containing an arbitration provision. Moreover, we note that Elite's Motion to Compel Arbitration/Stay Proceedings did not seek to stay any proceedings with respect to any claims by the other plaintiffs.

was inextricably intertwined with the issue of Snowden's suitability as a class representative. The district court stated its intention to revisit its decision to deny Elite's Motion to Compel Arbitration/Stay Proceedings at the time that it decided whether to certify the case as a class action.

Elite noted a timely appeal of the district court's denial of its Motion to Compel Arbitration/Stay Proceedings with respect to Snowden's claims. This is the appeal that is now before us.

II.

Although Snowden makes no challenge to our appellate jurisdiction, the fact that the district court not only denied Elite's Motion to Compel Arbitration/Stay Proceedings without prejudice, but also stated its intention to revisit the ruling at a later time triggered alarm bells of a premature appeal for our consideration. Significantly, when our appellate jurisdiction is in doubt, we must *sua sponte* raise and address the matter. *Lee v. Wetzel*, 244 F.3d 370, 373 (5th Cir. 2001) (federal appellate court must always be sure of its appellate jurisdiction and, if there is doubt, must address the jurisdictional issue *sua sponte* if necessary); *Braswell Shipyards, Inc. v. Beazer East, Inc.*, F.3d 1331, 1336 (4th Cir. 1993) (federal appellate court is compelled to raise *sua sponte* the issue of whether the district court properly certified for immediate appeal a judgment entered on less than all of parties' claims, and if certification was unwarranted, then appeal must be dismissed).

Having considered the relevant statutory language, we are fully satisfied that we possess appellate jurisdiction. Under 9 U.S.C. § 16(a)(1)(A)-(B), the FAA expressly permits an immediate appellate challenge to a district court's denial of a motion to compel arbitration and stay proceedings pending the outcome of arbitration. *Id.* ("An appeal may be taken from—(1) an order—(A)

refusing a stay of any action under section 3 of this title, (B) denying a petition under section 4 of this title to order arbitration to proceed . . . ."); *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 202 (4th Cir. 2000) (citing 9 U.S.C. § 16(a)(1)(B) and stating that § 16 "provides for immediate appeal of an order denying a § 4 petition to compel arbitration"). Here, the record unequivocally reflects that the district court entered an order denying Elite's Motion to Compel Arbitration/Stay Proceedings. Under the plain language of § 16(a)(1)(A)-(B) of the FAA, this circumstance is all that is necessary to grant us appellate jurisdiction in this case. We note that our sister circuits have reached the same conclusion in materially similar situations. *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 102-04 (3d Cir. 2000) (holding district court's order denying motion to compel arbitration was immediately appealable under § 16(a) of the FAA, even though district court stated that it would have to determine whether there was an actual agreement to arbitrate); *Koveleskie v. SPC Capital Markets, Inc.*, 167 F.3d 361, 363 (7th Cir. 1999) (holding that, despite the district court's declaration of a need for discovery before it could decide arbitration issue, there was no doubt that motion to compel arbitration was denied, and was thus immediately appealable under § 16(a) of the FAA). Having satisfied ourselves that we possess appellate jurisdiction, we now proceed to consider the merits of Elite's appeal.

III.

According to Elite, the Arbitration Agreement contractually obligates Snowden to arbitrate all of her claims in the present action, and the FAA required that the district court grant its Motion to Compel Arbitration/Stay Proceedings. In response, Snowden does not dispute that the Arbitration Agreement falls within the scope of the FAA. Nor does she dispute that her claims fall within the scope of the Arbitration Agreement. Rather, Snowden seeks to uphold the district court's denial of Elite's

Motion to Compel Arbitration/Stay Proceedings by attacking the validity of the November 4, 1999 Agreement on two grounds and by attacking the validity of the Arbitration Agreement on three grounds.

Snowden first attacks the validity of the November 4, 1999 Agreement on the ground that the deferred deposit transaction memorialized by that agreement is void *ab initio* under Maryland law for imposition of a usurious rate of interest. Snowden's second attack on the validity of the November 4, 1999 Agreement rests upon her allegation that Maryland law required Elite to be state licensed as a money lender (which she alleges it was not) in order to engage in deferred deposit transactions. She argues that if the November 4, 1999 Agreement is void *ab initio* for either or both of these grounds, then the Arbitration Agreement, as part of the November 4, 1999 Agreement, is also void *ab initio*.

Neither of these two grounds is a viable basis upon which this court may affirm the district court's denial of Elite's Motion to Compel Arbitration/Stay Proceedings. The law is well settled in this circuit that, if a party seeks to avoid arbitration and/or a stay of federal court proceedings pending the outcome of arbitration by challenging the validity or enforceability of an arbitration provision on any grounds that "exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, the grounds "must relate specifically to the arbitration clause and not just to the contract as a whole." *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). *See also Jeske v. Brooks*, 875 F.2d 71, 75 (4th Cir. 1989) (refusing to consider party's arguments that arbitration clause must be declared invalid on grounds that customer's agreement as a whole was invalid due to overreaching, unconscionability, fraud, and lack of consideration, because the alleged defects pertained to the entire contract, rather than specifically to the arbitration clause).

This rule is derived from the Supreme Court's opinion in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). In *Prima Paint*, the Supreme Court held that a claim of fraud in the inducement of the entire contract at issue was arbitrable under a broad arbitration clause. *Id.* at 403-04. The Court held that section 4 of the FAA, and by implication section 3 of the FAA, limits a federal court's jurisdiction to challenges to the arbitration clause itself:

> Under § 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that "the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue." Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally . . . . We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

Id. at 403-04 (internal footnotes omitted). This holding in *Prima Paint* has come to be known as the severability doctrine. *See, e.g., Sandvik AB*, 220 F.3d at 105.

Notably, the severability doctrine has been held not to apply when the party seeking to avoid arbitration contends that it never assented in the first place to the contract containing the arbitration provision. *See, e.g., Sphere Drake Ins., Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 590-91 (7th Cir. 2001) (district court should

determine whether signatory had power to bind company to contract containing arbitration agreement); *Sandvik AB*, 220 F.3d at 110 (district court should determine whether signatory had power to bind company to contract containing arbitration agreement); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992) (district court should determine whether signatory had power to bind family member to contract containing arbitration agreement). The federal appellate courts reaching these holdings logically reasoned that if a party never assented to the overall contract containing the arbitration provision, then the party never assented to the arbitration provision. *Id.* The question of whether a valid agreement to arbitrate exists being an issue for the district court, the district court is required to decide the assent issue even though the issue goes to the making of the entire agreement. *Sphere Drake Ins., Ltd.*, 256 F.3d at 590-91; *Sandvik AB*, 220 F.3d at 107; *Chastain*, 957 F.2d at 854.

Here, Snowden's allegations of usurious rates of interest and nonlicensure do not relate specifically to the Arbitration Agreement. Neither do they underlie a claim that Snowden failed to assent to the terms of the November 4, 1999 Agreement. Therefore, they cannot serve as a basis to uphold the district court's denial of Elite's Motion to Compel Arbitration/Stay Proceedings.

We note that our conclusion is squarely in accord with the Sixth Circuit's recent and well-reasoned decision in *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483 (6th Cir. 2001). In that case, the Sixth Circuit rejected the same void *ab initio* arguments that Snowden presses in the present appeal. Specifically, the Sixth Circuit held that the plaintiffs in that case (who had brought the action against a check cashing company and its majority owner alleging violations of federal and Kentucky law arising from deferred deposit transactions almost identical to those at issue in the present case) could not avoid arbitration by reason

of their allegations that the customer agreements containing the arbitration provisions were void *ab initio* under Kentucky law for requiring usurious rates of interest and/or because the defendant company did not hold a Kentucky license to lend money.[4] *Id.* at 489. In so doing, the Sixth Circuit first observed that the plaintiffs' allegations concerned the substance of the entire customer agreements rather than their failure to assent to such agreements or their own lack of signatory power. *Id.* at 490. Second, the court observed a distinction between entering into a loan agreement with an unlicenced lender and not assenting to a loan agreement at all. *Id.* Based upon these observations, the court vacated the district court's denial of the defendants' motion to compel arbitration and remanded the case to the district court for consideration in the first instance of the plaintiffs' other allegations that specifically challenged the enforceability of the arbitration provisions. *Id.* at 493. In sum, *Burden* supports our conclusion that Snowden's allegations of usurious rates of interest and non-licensure cannot serve as a basis to uphold the district court's denial of Elite's Motion to Compel Arbitration/ Stay Proceedings.

We next address Snowden's allegations that pertain specifically to the Arbitration Agreement. In this regard, Snowden first argues that the Arbitration Agreement itself is unenforceable because it does not include an express jury waiver provision. Without an express jury waiver provision, Snowden reasons that she could not have knowingly and voluntarily waived her Seventh Amendment right to a jury trial. Common sense dictates that we reject this argument. "[T]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Syndor v. Conseco Fin. Servs. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (internal quotation marks omitted).

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[4]The district court in *Burden* had denied the defendants' motion to compel arbitration solely on the ground that the plaintiffs had alleged void *ab initio* contracts. *Id.* at 493.

We also reject Snowden's argument that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages. Snowden's argument is unfounded in light of: (1) the fact that attorney's fees are recoverable by a prevailing plaintiff in a TILA action, 15 U.S.C. § 1640(a)(3), and a civil RICO action, 18 U.S.C. § 1962(c); and (2) the fact that, although the Arbitration Agreement provides that each party shall bear the expense of their respective attorneys' fees regardless of which party prevails in the arbitration, such provision expressly does not apply if it is "inconsistent with the applicable law . . . ." (J.A. 54). *Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000), *cert. denied sub nom. Johnson v. Tele-Cash, Inc.*, 531 U.S. 1145 (2001) ("Attorneys' fees are recoverable under the TILA, see 15 U.S.C. § 1640(a)(3), and would therefore appear to be recoverable in arbitration, as arbitrators possess the power to fashion the same relief as courts.").

Finally, we reject as meritless Snowden's unsupported argument that forcing consumers like her to arbitrate consumer protection claims against companies like Elite is against public policy relating to consumer protection. Congress enacted the FAA in 1925 in order "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Snowden has presented no authority or evidence establishing that the arbitral forum contemplated by the FAA and provided in the Arbitration Agreement is inconsistent with public policy relating to consumer protection. Indeed, we have recognized the arbitral forum specified by the Arbitration Agreement as one provided by a reputable arbitration organization. *Hooters*, 173 F.3d at 939. We also note that the Arbitration Agreement places no limitations

upon the substantive remedies available to Snowden in arbitration. In sum, we can discern no violation of public policy relating to consumer protection by requiring Snowden to resolve her claims against Elite in the arbitral forum.

As there is no dispute that Snowden's claims fall within the scope of the Arbitration Agreement or that the Arbitration Agreement falls within the scope of the FAA, and Snowden has failed to show sufficient justification for this court to hold the Arbitration Agreement unenforceable, we vacate the district court's order denying Elite's Motion to Compel Arbitration/Stay Proceedings and remand with instructions to grant the motion to the extent it seeks to compel arbitration of Snowden's claims and stay proceedings with respect thereto pending the outcome of such arbitration.

VACATED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Karen Dowhite, et al.	:	
Plaintiffs,	:	
	:	
	:	CIVIL NO. AMD 00-1945
	:	
v.	:	
:		
CHECKPOINT CHECK	:	
CASHING, et al.	:	
Defendants.	:	

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MEMORANDUM

This is another in a series of cases on my docket in which named plaintiffs purporting to represent a class of Maryland consumers have instituted claims under federal and state law based on the defendants' allegedly unlawful practices in respect to certain "payday loan" or "deferred presentment" transactions, as a component of defendants' check cashing enterprise. There has been a veritable flood of such cases in federal and state courts in the last five years. *See generally* Scott Andrew Schaaf, *From Checks to Cash: The Regulation of the Payday Lending Industry*, 5 N.C. Banking Inst. 339 (April 2001). Defendants, Checkpoint Check Cashing, Incorporated and Elite Financial Services, Inc., have renewed their motion to compel arbitration and stay proceedings (as to plaintiff Patricia Snowden) pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, or in the alternative, to dismiss.[1]

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[1]The motion is asserted with respect to Patricia Snowden only, but defendants indicate that they expect to raise the issue of arbitration more generally when the class certification issues are ripe. It is not at all clear to me why the existence of arbitration provisions binding on some persons

Snowden is one of numerous named plaintiff in what is manifestly a class action complaint. She is engaged in approximately 12 payday loans or "roll-over" transactions with defendants between June 1999 and February 2000. Compl. ¶ 68. These transactions occurred on the following dates: June 12, 1999; June 29, 1999; August 18, 1999; September 5, 1999;[2] October 22, 1999; November 4, 1999; November 18, 1999; December 30, 1999; January 12, 2000; January 25, 2000; and February 7, 2000. Compl ¶¶ 69-92. One of these transactions, a provision for arbitration was contained only in the agreement memorializing the transaction completed on November 4, 1999. This provision purports to operate both retrospectively and prospectively as to require Snowden to arbitrate any and all claims arising out of any and all such transactions at any time. Thus, defendants move the court to compel arbitration of claims arising from all transactions entered into by Snowden based on her execution of so-called Customer Agreement containing an arbitration provision on this one occasion.

Defendants apparently filed a Demand for Arbitration with the American Arbitration Association on August 1, 2000, but for the most of the last year since they did so, the parties have been engaged in settlement discussions. When those negotiations ended without success, preliminary motions practice began in earnest, of which the instant motion is an additional installment.

There is considerable legal support for the enforceability of the arbitration provision at issue in this case. Indeed, taking their lead from the Supreme Court, as of course they must, the courts of appeals, and in turn federal trial courts, have in recent years crafted from the Federal Arbitration Act interpretations and constructions

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should preclude a class certification as to others, but that issue is not presented by the pending motion.

[2]Plaintiffs indicate that another transaction occurred in September, but have not provided the date. Compl. ¶77.

that have turned that statute into a tsunami, which has washed away constitutional and statutory protection clearly intended by Congress to afford important protections to the tangible and intangible rights of broad classes of persons. Snowden has made every imaginable argument in her effort to avoid the effect of the arbitration provision: (1) adhesion contract; (2) unconscionability; (3) improper waiver of class action status for Truth in Lending Act claims, together with improper waiver of the right to recover attorney's fees as a prevailing plaintiff thereunder; (4) involuntary waiver of the right to a jury trial; (5) improper retroactivity; and (6) illegality of the contract providing for the underlying financial transactions, i.e., an assertion that the agreement pursuant to which the transactions were effected was void *ab initio*" under state law.

I am satisfied that there is no compelling reason (or even good reason) to decide now whether, in a class action case with numerous named plaintiffs, only one of whom has executed an agreement containing an arbitration provision, that provision is enforceable. To the contrary, there will be time and opportunity enough, during the briefing on the upcoming motion for class certification, to determine whether Snowden has any role to play in this action or whether, instead, her sole remedy lies in an arbitral forum. Indeed, the issue of her suitability as a class representative is ineluctably bound up with the issue of the enforceability of the arbitration provision which she, alone among the named plaintiffs, executed. Accordingly the motion shall be denied without prejudice and discovery on class certification issues shall proceed. An Order Follows.

Filed: September 7, 2001 s/

ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Karen Dowhite, et al.	:	
Plaintiffs,	:	
	:	
	:	CIVIL NO. AMD 00-1945
	:	
v.	:	
:		
CHECKPOINT CHECK	:	
CASHING, et al.	:	
Defendants.	:	

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ORDER

For reasons set forth in the foregoing Memorandum, it is the 7th day of September, 2001, by the United States District Court for the District of Maryland, ORDERED

(1) That Defendants' Motion to Compel Arbitration and Stay Proceedings of Patricia Snowden, or, in the Alternative, to Dismiss (Paper No. 24) is DENIED WITHOUT PREJUDICE; and it is further ORDERED

(2) That THE PARTIES SHALL CONDUCT DISCOVERY ON CLASS CERTIFICATION ISSUES AND PLAINTIFFS SHALL FILE THEIR MOTION FOR CLASS CERTIFICATION ON OR BEFORE JANUARY 29, 2002, and it is further ORDERED

(3) That the Clerk shall TRANSMIT a copies [sic] of this Order and the foregoing Memorandum to the attorneys of record.

s/
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE